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No. 79-1527

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

THE STATES OF ALASKA, ARKANSAS, CALIFORNIA, COLORADO, IOWA, MISSOURI, NEBRASKA, NEW MEXICO, OREGON AND WASHINGTON
(Plaintiffs in the *Fine Paper Antitrust Litigation*, MDL Docket No. 323),
Petitioners,

vs.

THE HONORABLE JOSEPH L. McGLYNN, JR.,
Judge, United States District Court
for the Eastern District of Pennsylvania,
Respondent.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

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PRELIMINARY STATEMENT

The motion for leave to file petition for writ of mandamus is directed to a routine question regarding the application of Rule 33(c), Federal Rules of Civil Procedure, to interrogatories in an action pending before respondent court. We respectfully submit that the order of that court is in accord with Rule 33(c) and that, in any event, there is no occasion for extraordinary review by mandamus of the discovery order in question.

STATEMENT OF THE CASE

Petitioners are ten states, each of which has brought an antitrust action against certain paper mills, their subsidiaries, and others. Their cases were consolidated for pretrial proceedings with other cases including class actions brought by merchants who had made direct purchases from the mill defendants. Some of the defendants, in September 1979, served upon petitioners joint interrogatories requesting information with respect to the alleged purchases by petitioners for which damages were claimed. These interrogatories were designed, among other things, to ascertain the extent to which petitioners had made direct purchases within the meaning of *Illinois Brick Co.* v. *Illinois* (1977) 431 U.S. 720 (see Petition, p. 9, Appx. 5, pp. A12-A13). Instead of answering those interrogatories, petitioners referred defendants to a mass of documents which had been produced in class action discovery before the district court (see Petition, p. 10, Appx. 7, pp. A22-A24).

The district court ordered petitioners to answer the interrogatories in question (Petition, Appx. 1, pp. A4-A5) and denied their motion for reconsideration (Petition, Appx. 2, p. A7). On March 17, 1980, petitioners filed a petition for mandamus with the Court of Appeals for the Third Circuit, claiming that the district court had abused its discretion in requiring them to answer the interrogatories. That court denied the petition the next day (Petition, Appx. 4, p. A11). Petitioners thereupon filed the motion for leave to file a petition for writ of mandamus and a request for a stay with this Court on March 31, 1980. The request for stay was denied.

REASONS WHY THE MOTION SHOULD BE DENIED

The district court properly rejected petitioners' efforts to circumvent the requirements of Rule 33(c) by vague references to a mass of documents without specifying which of those documents within the mass actually contained the information sought (Petition, Appx. 7, p. A24).[1]

Rule 33(c), in providing an option to the party answering interrogatories to refer to business records, expressly requires that the answering party "*specify* the records from which the answer may be derived or ascertained" (emphasis added). As another district court ruled in a comparable situation:

> "Since a respondent is required to answer proper interrogatories, it is not plausible to assume that a response that an answer may (or may not) be found in its records, accompanied by an offer to permit their inspection is sufficient. This is little more than an offer to play the discredited game of blindman's buff at the threshold level of discovery. * * *
>
> "I conclude that the option afforded by Rule 33(c) is not a procedural device for avoiding the duty to give information. It does not shift to the interrogating party the obligation to find out *whether* sought after information is ascertainable from the files tendered, but only permits a shift of the burden to dig it out once the respondents have *specified* the records from 'where the answer' can be derived or ascertained" (*In re Master-Key Antitrust Litigation* (D.Conn. 1971) 53 F.R.D. 87, 90; emphasis added).

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[1]The bracketed material which petitioners have inserted on page A24 is not contained in the answers filed by Oregon in the district court.

Furthermore, the full record before the district court shows the falsity of petitioners' assertion that the burden of deriving or ascertaining the requested information would have been no greater for the defendants than for the states (Petition, p. 10). To obtain the information sought by the interrogatories, it would be necessary for defendants to know, among other things, whether petitioners excluded certain brands or bidders, imposed requirements of printing, quantities, delivery, or bidding on an entire series of items, or made awards at other than the lowest price. Each defendant needs information concerning petitioners' purchases and attempts to purchase from other defendants, alleged co-conspirators and non-conspirators, because petitioners claim antitrust violations and seek to recover damages in respect of those transactions. Petitioners' purchasing agents and their employees clearly know vastly more about such requirements and practices than do the defendants. As the Advisory Committee, which recommended Rule 33(c), pointed out,

> "A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records" (28 U.S.C.A. Fed.Rules Civ.Proc., Rule 33, p. 322).

In any event, we submit that a writ of mandamus is not the proper means of reviewing the alleged abuse of discretion of the district court in requiring petitioners to answer the interrogatories in question.

The only case of which we are aware in which this Court has held that a writ of mandamus is appropriate to review a discovery order of a Federal district court is *Schlagenhauf* v. *Holder* (1964) 379 U.S. 104. In that case this Court held that it was not inappropriate for a court of appeals to have determined whether the district court had *the power* to order a mental and physical examination of a defendant under Rule 35 of the Federal Rules of Civil Procedure (379 U.S. 110). Although it held that "special circumstances" present in that case justified consideration of mandamus, the Court pointed out that:

> "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' *Parr* v. *United States,* 351 U.S. 513, 520; see *Bankers Life & Casualty Co.* v. *Holland, supra,* at 382" (379 U.S. 112).[2]

For this reason, in *Kerr* v. *United States District Court* (1976) 426 U.S. 394, this Court upheld a refusal to use mandamus to vacate discovery orders which required petitioners to produce documents sought by prisoners in a class action. The Court noted that "the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation' "

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[2]Petitioners erroneously rely on *La Buy* v. *Howes Leather Co.* (1957) 352 U.S. 249 (Petition, p. 15), which did not involve a discovery order but was concerned with a persistent disregard of other Federal rules which "amounted to little less than an abdication of the judicial function" (352 U.S. 256). There is no suggestion in the case at bar that, even if the court's order were erroneous, it evidenced a "persistent" course of conduct or abdication of judicial responsibilities such as was presented in *La Buy*.

of mandamus (426 U.S. 402, quoting *Will* v. *United States* (1967) 389 U.S. 90, 95).

We respectfully submit that the order of the district court in the case at bar was within the court's jurisdiction, that there is no basis for any claim that it lacked the power to require answers to the interrogatories in question, and that even if the order were erroneous, the proper method of review is an appeal.

CONCLUSION

For the foregoing reasons, we respectfully submit that the motion for leave to file petition for writ of mandamus should be denied.

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